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Before the
Federal Communications Commission
Washington, D.C. 20554

Comments by the Property Rights Alliance In the Matter of:

Expanding Consumers' Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80

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April 21, 2016

Commissioners Tom Wheeler, Mignon Clyburn, Jessica Rosenworcel, Ajit Pai, and Michael O'Rielly:

The Property Rights Alliance (PRA), an affiliate of Americans for Tax Reform, stands as an advocacy organization dedicated to the protection of physical and intellectual property rights, both domestically and internationally. PRA's efforts to protect private property include opposition to government "takings" of property and intellectual property theft, both of which chill individual liberty, creativity, innovation, investment, and jobs.

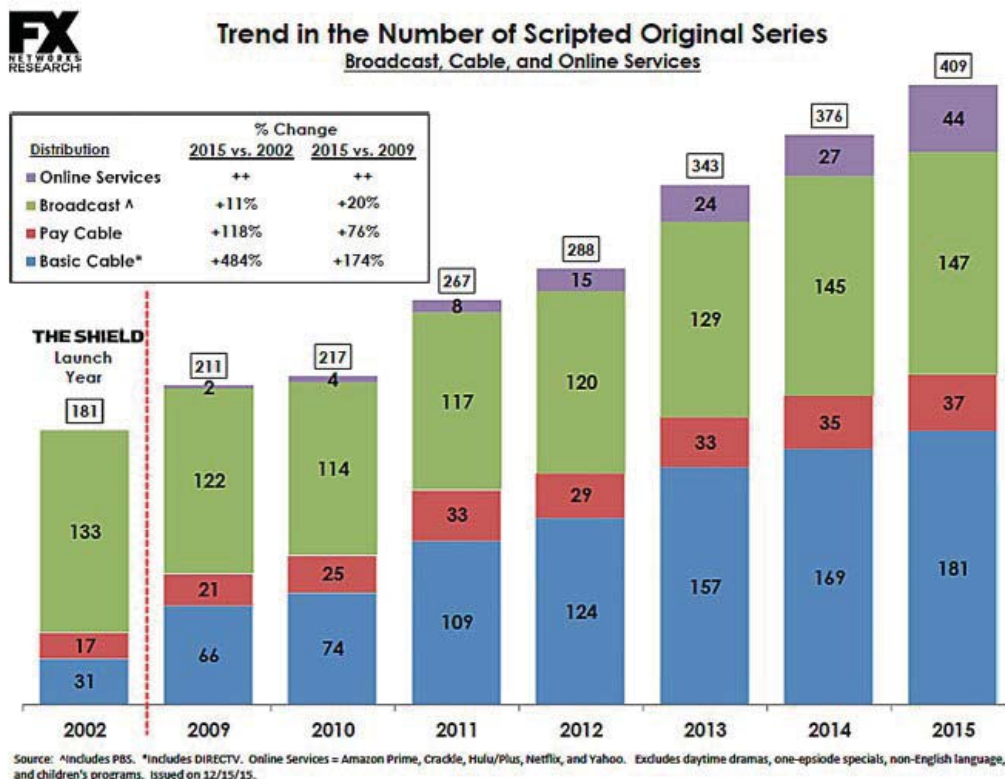
Consistent with these values, we oppose the Commission's seriously flawed set-top box proposal that will undermine the economics of creation by compelling rights holders and pay-TV service providers to hand control of their products and services to third party providers without negotiation or compensation.

THE PROPOSAL VIOLATES COPYRIGHT

The Founding Fathers recognized the importance of IP in Article I Section 8 of the Constitution: “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹

This clause, articulated by the Founders, is rooted in the notion that the best way to encourage the creation and dissemination of creative works to the benefit of both the public good and individual liberty is to recognize ones rights to his or her intellectual property.

The Founders vision is evident in the video marketplace. Consumers have never had more content to watch or ways to watch it. For example, FX Networks recently released a report that “shows the explosion of scripted series on TV over the past few years. The number of scripted shows on broadcast, cable and streaming nearly doubled between 2009 and 2015, going from 211 to 409 this year.”²



¹ <https://www.law.cornell.edu/constitution/articlei>

² <http://tvbythenumbers.zap2it.com/2015/12/16/peak-tv-in-one-chart-409-scripted-shows-aired-in-2015/>

And all this great content is widely available online in addition to traditional pay-TV services. SNL Kagan recently released a report concluding, “98% of premium films and 94% of premium TV series were digitally available on at least one of the online services that were reviewed.”³

The dynamic video marketplace is governed by complex contractual agreements between willing buyers (pay-TV distributors) and sellers (content creators and owners). These contracts stipulate the terms by which TV shows and movies are presented to consumers and include things like channel location, neighborhooding, advertising revenue splits, quality of presentation, security, and more.

The FCC proposal needlessly upends this delicate ecosystem by allowing third party device manufacturers and service providers to create entirely new video services by repackaging existing services absent any of the contractual obligations existing providers must honor. As a consequence, there will no longer be willing buyers and sellers. Instead, a vibrant marketplace will be replaced by government mandates.

The FCC has no right to force creators to give away their creations – and moreover, risks harming consumer welfare by chilling creation of the very TV shows and films they’re so anxious to give away.

THE PROPOSAL IS TANTAMOUNT TO A FORCED TECH TRANSFER CONTRADICTS US POLICY

In exchange for access to developing markets, like China, governments sometimes demand the transfer of intellectual property for use by their own domestic companies. As a result, American creators and innovators often find themselves competing with these very same companies, who enjoy a significant competitive advantage as they spend little on research and development – whereas American companies invest billions.

James McGregor, author of *One Billion Customers: Lessons from the Front Lines of Doing Business in China*, describes these mercantilist policies as “enhancing original innovation through co-innovation and re-innovation based on the assimilation of imported technologies.”⁴

The US government has a long history of opposing foreign government policies that force American entrepreneurs to hand over their valuable IP to competitors for commercial exploitation. In a recent speech at Stanford University discussing the importance of enacting and implementing the Trans Pacific Partnership, Ambassador Michael Froman warned:

In the absence of rules ensuring that the Internet remains open and free, there is a significant risk of states erecting multiple barriers to its operation... Requirements that companies

³ <http://www.spcapitaliq.com/our-thinking/newsroom/snl-kagan-study-finds-that-films-and-television-shows-are-more-digitally-accessible-than-in-previous-years>

⁴ <http://fortune.com/2014/08/12/china-said-it-was-coming-after-western-companies/>

transfer proprietary technology, hand over their source code to state-owned competitors, [or] adopt a particular technology standard or form of encryption in order to serve a market.⁵

Froman's examples sound eerily similar to the FCC's proposal. Indeed, the FCC proposes to force 1) rights holders and MVPDs to transfer their IP, products, services and data to new competitors; and 2) adoption of a government technology and encryption standard to serve a government created market for set-top boxes.

The idea that a domestic government agency would propose a rule that would be received warmly by China's central economic planners is disturbing, at best.

THE PROPOSAL COULD LEAD TO INCREASED PIRACY

Online piracy is a real concern. One study concluded that "23.8% of the total bandwidth used by all internet users, residential and commercial" is infringing.⁶ In contrast, the Pay-TV market is piracy free thanks to strong contractual and technological measures put in place by content owners and distributors. However, supporters of the set-top box proposal have expressed their intent to mix content from the Internet with pay-TV service⁷ by virtue of "universal search," potentially displaying illegal and legitimate content side-by-side – and there is no language in the proposed rule barring this behavior.

Search plays a large role in facilitating piracy. As Tim Lee pointed out in a recent Medium post:

According to one survey, 74% of consumers say they used a search engine when they first viewed pirated content. And researches at Carnegie Mellon University conducted an experiment conclusively demonstrating that search rankings drive consumer behavior. The more prominently pirated content appears in search results, the more likely consumers are to choose it.⁸

To be clear, there is nothing wrong with universal search. But robbing rights holders of their ability to negotiate with search providers over how their content is discovered in the pay-TV ecosystem is a step backwards.

Further, piracy-laden set-top boxes are a real concern. As was pointed out in a recent International Business Times article, "the City of London Police's Intellectual Property Unit (IPCU) arrested a 38-year-old man and raided his London home... seizing more than 500 IPTV set-top boxes as well as computer hardware and financial documentation."⁹

⁵ <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/february/remarks-ambassador-michael>

⁶ <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>

⁷ <https://www.youtube.com/watch?v=u1rB8TA1r1E>

⁸ <https://medium.com/@TLee/piracy-data-and-allvid-if-past-is-prologue-creators-should-worry-a-google-delivered-pay-tv-546b562f59bd#.q5det1z38>

⁹ <http://www.ibtimes.co.uk/london-piracy-bust-police-seize-500-set-top-boxes-allowing-free-access-paid-tv-services-1551448>

THE FREE MARKET IS WORKING

The marketplace for video devices and services is already functioning well, and the goal of increasing consumers' choices for video devices is already being realized in the marketplace. There is simply no need or justification for a mandate that tramples IP rights such as the one the Commission is considering.

I urge you to reject this proposal.

Lorenzo Montanari
Executive Director
Property Rights Alliance